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No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JOHN P. LOMENZO, Secretary of State of the State of New York, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Defendants-Appellants,

v.

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
Plaintiffs-Appellees,

and

PAUL R. SCREVANE, President of the City Council of the City of New York, JAMES POWER, MAURICE J. O'ROURKE, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1099

JOHN P. LOMENZO, ET AL.,
Defendants-Appellants,

v.

WMCA, INC., R. PETER STRAUS, ET AL.,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, plaintiffs-appellees WMCA, Inc., R. Peter Straus, *et al.*, move that the judgment of the District Court be affirmed or that the appeal be dismissed. In this motion they are joined by defendants-appellees Paul R. Screvane, President of the City Council of the City of New York, Eugene H. Nickerson, County Executive of Nassau County, and certain Commissioners of the Board of Elections of the City of New York.

Statement

This is a direct appeal from an order (R. 1325, 1383) by a three-judge district court, declaring invalid three reapportionment statutes (known as Plans B, C and D) enacted in immediate succession at a special "lame-duck" session of the state legislature. The court below held that a fourth such reapportionment statute (Plan A) did not violate federal law, refused to consider whether all four bills violated state law, refused to defer any ruling on these bills pending a determination by a state court of their validity under state law and refused to stay the then pending state court proceeding challenging the validity of the four bills under the state constitution (R. 1328-65).

Subsequent to this ruling by the federal court, the Supreme Court of New York (per Matthew Levy, J.) held that all four statutes violated the state constitution on grounds entirely independent of those considered by the court below (Sup. Ct., N. Y. Co., March 15, 1965). On April 14, 1965, this ruling was affirmed by the New York Court of Appeals. *Matter of Orans*, 15 N. Y. 2d 339; (Appendix C to J. St. in WMCA v. Lomenzo, No. 1104, October T., 1964).

ARGUMENT

I.

In this, the fourth appeal of this case to this Court,[1] appellants seek to reinstate on federal grounds statutes which in a subsequent proceeding have been held by the highest state court to be violative of the state constitution.[2] Thus, the outcome of this appeal, if granted, would have no practical effect upon the apportionment of New York State except to continue and intensify a condition of uncertainty and confusion. New York State through action by its legislature,[3] state courts, and the federal district court is working its way towards a solution of its apportionment problems and review by this Court at this time would be inappropriate and would serve not to expedite but rather to delay implementation of this Court's rulings in *Reynolds* v. *Sims*, 377 U. S. 533 and *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633. The decision below, insofar as challenged by this appeal, is entirely correct and presents no substantial federal question.

At a special session of a "lame-duck" legislature held in December, 1964, four apportionment bills were passed. The basic plan (Ch. 976, known as Plan A) was first enacted, and was then successively amended three times by Plans B, C and D (Chs. 978, 979, 981). This stratagem was designed with the thought that the courts would first

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1. Prior orders and opinions of this Court appear at 370 U. S. 190; 377 U. S. 633 and 379 U. S. 694.

2. *Matter of Orans*, 15 N. Y. 2d 339; App. C to J. St. No. 1104, Oct. T., 1964.

3. On May 24, 1965, the State Senate and Assembly adopted statutes which, if signed by the Governor, would have the effect of superseding those here sought to be reviewed. New York Times, May 25, 1965, p. 1.

review the last adopted Plan D which was of most dubious validity but politically preferred. If invalid, the court would next review Plan C, then B and finally Plan A. The decision below in this case holds Plans B, C and D violative of the federal constitution, holds that Plan A is not violative of the federal constitution[4] and refuses to review its validity under the state constitution, or to stay a then pending state court proceeding challenging its validity under state law (R. 1328-65). *In Matter of Orans*, 15 N. Y. 2d 339, the New York Court of Appeals affirmed the decision of the New York Supreme Court that *all four plans* violate state law in that they provide for Assembly membership of over 150 contrary to the explicit mandate of the state constitution that the Assembly be comprised of 150 members.[5] Thus independent state grounds in no way treated by the court below renders invalid the statutes here in question.[6]

In any event, the decision below is correct and presents no substantial federal question.

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4. A protective notice of appeal and Jurisdictional Statement have been filed by Appellees herein asking that, if this Court note probable jurisdiction in this appeal, it also review and reverse the ruling as to Plan A. No. 1104, October T., 1964.

5. In this respect, the references in the Jurisdictional Statement to the state court's invalidation of Plan A (J.St. 11, 32) may be misleading. The state court's rulings clearly invalidated on grounds of state law all four plans, including the three ruled invalid as a matter of federal law by the court below.

6. It is clear that if the court had deferred its ruling until the state court proceedings had been resolved, as appellees requested, there would have been no occasion for a ruling under the federal constitution.

II.

The district court found an objectionable feature of Plan B and Plan D to be the use of votes cast in the 1962 general election as the measure of population, instead of citizen population determined by the 1960 federal census, the traditional method prescribed in the state constitution. See N. Y. CONST. ART. III §4.

The court found an objectionable feature of Plan C and Plan D to be the provision for members of the Assembly having fractional votes.

In rejecting the use of votes cast as a measure of population and the use of fractional votes in the Assembly, the district court limited its holding to the particular circumstances of this case. It specifically expressed no opinion "on the validity of a voter basis under other circumstances" (J.St. A-18, fn. 3) or "on the use of fractional or weighted voting either as a temporary device to remedy malapportionment or in governmental organs below the state level" (J.St. A-17, fn. 2). Its rejection of votes cast as a basis for apportionment was expressly narrowed to "the circumstances of this particular case, and limiting ourselves thereto" (J.St. A-17).

The district court rejected the proposals for using the 1962 voter base and fractional votes for the Assembly because it concluded that they perpetuated to an appreciable extent the effect of the discriminatory scheme which this Court had previously struck down. The district court expressly noted this Court's "concern for New York's pre-existing 'bias against voters living in the State's more populous counties', *WMCA, Inc.* v. *Lomenzo, supra* at 654 • • • " (J.St. A-17). In the light of this concern, fractional voting, being "enjoyed mainly by the sparsely

populated areas of the state" was "particularly vulnerable" (J.St. A-15, A-16). By the same reasoning the 1962 voter base was rejected: "we cannot condone this ghost of prior malapportionment" (J. St. A-17).

A. The use of votes cast in the 1962 general election as the population measure.

The circumstances which led the district court to reject the use of votes cast in the 1962 general election as the population measure are stated in its opinion (J. St. A-17):

> "Since 1894, New York has districted its Legislature by using as an apportionment base the state's citizen population. Now, for the first time in seventy years, the very same body which has been held by the Supreme Court to be malapportioned would switch its apportionment base from citizen population to actual voters. The effect of this switch would be reduce New York City's share of the total apportionment base from 45.7% to 41.9%. In terms of representation in the Legislature under Plan B, New York City would thereby lose approximately 2½ Senate seats and nearly 7 Assembly seats".

A similar comparison can be made between the Assembly apportionments contained in Plan C (165-vote Assembly) and Plan D (150-vote Assembly). Both these plans also provided fractional votes in the Assembly. Plan C, which used 1960 citizen population, apportioned to the City 44.9% of the total number of Assembly votes whereas in Plan D, which used 1962 votes cast, the figure drops to 41.3%.

Once these results are shown, it is certainly reasonable to infer, as did the district court, that the outgoing Legislature adopted this novel measure in order to perpetuate

to some extent the discriminatory disadvantage placed on the people of New York City under the previous apportionment scheme.

B. The use of fractional votes in the Assembly.

As the district court pointed out, "fractional districts are enjoyed mainly by the sparsely populated areas of the State" (J.St. A-15), and "None of the Assemblymen with fractional votes under either Plan are from New York City or Nassau County" (J.St. A-16).

Both Plans C and D purport to assign fractional votes in the Assembly to the counties with less than one full ratio of population and to "counties with a substantial remainder above a full apportionment ratio, on the basis of equality remainders." STATE OF NEW YORK, SUPP. REP'T OF JOINT LEGIS. COMM. ON REAPPORTIONMENT 34 (Dec. 30, 1964).

Fractional votes were thus apportioned not only to counties not entitled on their populations to at least one assemblyman, but also to more populous counties which already had received one or more assemblymen on full ratios.[7]

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7. Under Plan D (ratio: 39,477), there are ten such counties, with three having two or more full-vote districts: *Monroe*—six full-vote districts plus one half-vote district for its remainder of 11,245; *Albany*—three full-votes plus one half-vote for its remainder of 20,428; and *Oneida*—two full-votes plus one half-vote for its remainder of 17,449.

Under Plan C (ratio: 98,429), five counties have a full-vote district plus a fractional-vote district and one (Niagara) has two full-vote districts and one quarter-vote district for a remainder of 38,819. The Jurisdictional Statement (pp. 9, 17, 22) incorrectly implies that fractional-vote districts are limited to counties which have no more than one full-vote district.

None of the six counties which each has 6% or more of the state's population is apportioned a fractional-vote district under either Plan C or Plan D. Yet under Plan D two of them, Kings (23,910) and New York (26,756), have substantial remainders over full ratios. Likewise, under Plan C, Queens has an unrepresented remainder of 59,788 and Kings 57,785, the ratio being 98,429.

In short, the method used by the Legislature to apportion fractional votes among the counties appeared to perpetuate, in altered form, the invidious discrimination against the most populous counties of the State which this Court's ruling previously struck down.

CONCLUSION

For the foregoing reasons, we submit that the decision below with respect to Plans B, C and D is correct and that this appeal presents no substantial question. The order of the three-judge district court insofar as appealed from herein should be affirmed.

Respectfully submitted,

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May 25, 1965.